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Michael Hummer, Jeffrey Bleich and Sheldon Sloan

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Francis Fahy,

Plaintiff,

v.

Justices of the Supreme Court of the State of California, et al.,

Defendants.

Case No. CV 08-2496-CW

STATE BAR DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Date: Thurs, October 16, 2008
Time: 2:00 p.m.
Place: Courtroom 2, 4th Floor
Judge: Hon. Claudia Wilken

TABLE OF CONTENTS

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Federal Cases

TABLE OF AUTHORITIES

Pages

Federal Cases

TABLE OF AUTHORITIES

Pages

Federal Cases

TABLE OF AUTHORITIES

Pages

Federal Cases

State Cases

TABLE OF AUTHORITIES

Pages

State Cases

Constitutions

Rules

Statutes

TABLE OF AUTHORITIES

Pages

Statutes

I. INTRODUCTION

No one enjoys being disciplined by the State Bar, in particular Plaintiff Fahy. His animus towards California's attorney disciplinary system and its State Bar Court, judges and prosecutors and others is plainly evident in his complaint. What is not plainly evident, however, is the factual basis for his federal lawsuit, which presents a grab bag of highly conjectural and conclusory allegations aimed at undermining the state's disciplinary proceeding against him.

Fahy is a member of the California bar who was disciplined for misappropriation, among other serious ethical misdeeds, by California's Supreme Court upon the recommendation of the State Bar Court. After the State Bar Court recommended discipline, Fahy petitioned for review to California's Supreme Court, which denied his petition. Thereafter, Fahy petitioned for writ of certiorari to the United States Supreme Court, which also denied his petition. Finding no satisfaction in either of these courts, Fahy brought this federal civil rights action hoping that this Court will do what the state's highest court and the nation's highest court refused to do, declare him free of the findings of misconduct and release him from his disciplinary sanctions. However, none of Fahy's claims are properly before this Court.

First, Fahy's entire case is barred by Eleventh Amendment Immunity *and* by the Rooker-Feldman doctrine, which prevents this Court from exercising subject matter jurisdiction over suits that are de facto appeals of state court judgments.

Second, Fahy's federal claims are barred by judicial immunity and claim and issue preclusion, and are substantively meritless in any case. His state claims fare no better: they are barred by Fahy's failure to comply with the California Government Tort Claims Act, by judicial and licensing immunity under California law, and because the alleged facts simply do not state claims for violation of California's Unruh Act and the Unfair Competition Act.

Third, and finally, Fahy's requested equitable relief asks this Court to interfere with the California Supreme Court's control over attorney discipline by declaring the entire disciplinary system unconstitutional and all decisions of the State Bar Court void and invalid, among other things. Such declaratory and injunctive relief would obviously be inappropriate.

Accordingly, this case should be dismissed in its entirety with prejudice.

II. BACKGROUND

A. The State Bar Defendants

This motion is brought by The State Bar of California, Hon. Judith Epstein, Hon. Madge Watai, Hon. Ronald Stovitz, Hon. Patrice McElroy, Scott Drexel, Lawrence J. DalCerro, Donald R. Steedman, Tammy Albertsen-Murray, Erica L. Dennings, Michael Hummer, Jeffrey Bleich and Sheldon Sloan (collectively the "State Bar Defendants").[1] The identity of each, and their roles in this matter, is discussed below.

1. The State Bar of California

The State Bar of California is a constitutional entity, established by Article VI, section 9 of the California Constitution, and expressly acknowledged as an integral part of the judicial function. See Cal. Const., art. VI, § 9; Cal. Bus. & Prof. Code, § 6001; In re Rose, 22 Cal.4th 430, 438, 93 Cal.Rptr.2d 298 (2000). It is a public corporation created as an administrative arm of the California Supreme Court for the purpose of assisting in matters of admission and discipline of attorneys. See In re Attorney Discipline System, 19 Cal.4th 582, 598-99, 79 Cal.Rptr.2d 836 (1998); see also Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 566 (9th Cir. 1990). Although the State Bar conducts its disciplinary proceedings under statutory authority, it is well established that the California Supreme Court retains inherent power to control all matters related to attorney discipline. In re Attorney Discipline System, 19 Cal.4th at 600.

2. Hon. Judith Epstein, Hon. Madge Watai, Hon. Ronald Stovitz, Hon. Patrice McElroy

Defendants Epstein, Watai, Stovitz and McElroy are judges of the State Bar Court. The State Bar Court is the adjudicative arm of the State Bar in disciplinary matters. Cal. Bus. & Prof. Code § 6086.5; Cal. Rules of Ct. rule 9.10; In re Rose 22 Cal. 4th at 439. The State Bar Court

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[1] The defendant identified as "Thomas Hummer" is presumed to be State Bar ex-employee "Michael Hummer". Erica "Demmings" is properly spelled "Dennings". Defendants Sheldon Sloan, Jeffrey Bleich, Hon. Madge Watai and Michael Hummer, who have not been properly served with summons and complaint, hereby waive service of process.

includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body in independently reviewing determinations of the Hearing Department on a *de novo* basis. Cal. Rules of Ct. rule 9.12; Rules Proc. of the State Bar rule 300 et seq. State Bar Court disciplinary decisions are only recommendations to the California Supreme Court, which undertakes an independent determination as to whether the attorney should be disciplined as recommended. In re Rose, 22 Cal.4th 430, 439. Judge McElroy, a Hearing Department Judge, presided over Fahy's disciplinary proceeding. Judges Epstein, Watai and Stovitz are Review Department Judges who reviewed Judge McElroy's decision in the Fahy matter.

3. Scott Drexel, Lawrence J. DalCerro, Donald R. Steedman, Tammy Albertsen-Murray, Erica L. Dennings, Michael Hummer

Drexel, DalCerro, Steedman, Albertsen-Murray, Dennings, and Hummer are (or in the case of Hummer "were") employees of the State Bar's Office of the Chief Trial Counsel. The Office of the Chief Trial Counsel has primary responsibility for carrying out the prosecutorial functions of the State Bar. Drexel is the State Bar's Chief Trial Counsel. The Office of the Chief Trial Counsel is divided into separate departments and includes the Office of Enforcement that investigates and prosecutes State Bar disciplinary matters. DalCerro (Assistant Chief Trial Counsel), Steedman (Senior Attorney), Albertsen-Murray (Attorney) and Dennings (Attorney) are prosecutors in the Office of Enforcement while Hummer was an Investigator in that office. Albertsen-Murray prosecuted the disciplinary charges against Fahy at the trial level while Steedman represented the Office of Enforcement at the Review Department stage of these proceedings. Fahy alleges that Dennings sent him a letter notifying him that he would face disciplinary charges (Complaint, 12:15-19) and that Dennings and Hummer were present during discussions about a stipulation concerning his disciplinary matter. Complaint, 12:23-25. Fahy makes no specific factual allegations against Drexel or DalCerro.

4. Jeffrey Bleich, Sheldon Sloan

Bleich is the current President of the State Bar's Board of Governors. Sheldon Sloan is the immediate past President of the State Bar's Board of Governors. Fahy makes no specific

factual allegations against these two gentlemen.

B. Fahy's State Bar Disciplinary Proceeding

Fahy was admitted to the practice of law in California on July 31, 1990. RJN, Ex. B, p. 1. On December 16, 2003, the State Bar's Office of Enforcement filed disciplinary charges against Fahy alleging that he failed to notify a client of his receipt of insurance proceeds, failed to maintain client funds in trust, committed an act involving moral turpitude by misappropriating his client's funds, and failed to promptly pay client funds. RJN, Ex. B, p. 4. Fahy alleges that prior to the filing of these charges defendants Dennings and Hummer offered him a private reproval with an admission of moral turpitude. Complaint, 12:15-13:3. After a three-day trial, Judge McElroy found Fahy culpable on all four charged counts in a Decision filed April 20, 2005. RJN, Ex. A. Judge McElroy recommended that Fahy be actually suspended for 18 months, among other conditions. RJN, Ex. A, 13:21-14:6. Fahy appealed the Hearing Department Decision to the Review Department which issued its Opinion on Review on February 23, 2007. RJN, Ex. B. The Review Department adopted the Hearing Department's factual findings but recommended that the Fahy's actual suspension be increased from 18 months to two years. RJN Ex. B, p. 1.[2]

On May 2, 2007, Fahy filed a petition for review in the Supreme Court of California. RJN, Ex. C. Fahy raised various issues including: (1) whether the State Bar's presumption that an attorney misappropriated funds when his trust account falls below the required amount is contrary to Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) (holding that state's

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[2] The Review Department pointedly noted in its Opinion that throughout the disciplinary proceedings Fahy "made a series of false and demeaning remarks about the State Bar, its prosecutor in this case, the State Bar Court, and the hearing judge … [including] … repeated descriptions of the State Bar and its prosecutors as 'frauds', 'liars and thugs', 'hillbilly scum', 'criminals', … and … referred to the Hearing Department as a 'kangaroo court' that not only 'tolerates corruption and perjury' but also employs 'jack-booted thugs' who use 'nazi tactics'." He accused Judge McElroy of being "willfully corrupt" and a "prolific liar" who suffers from "perversion and vile racism". Judge McElroy also noted that "[s]imply because the hearing judge, State Bar prosecutor, and complaining witness are African-American, respondent expected the hearing judge to remove herself from the case due to bias." And this is only a partial description of Fahy's offensive behavior during the disciplinary trial. RJN, Ex. B, p. 4 n. 9.

use of interest in IOLTA accounts to pay for legal services qualified as a "public use" and was not a regulatory taking.) and (2) whether his client had standing to assert a claim of misappropriation in his case. Fahy further complained that: He did not receive a fair hearing, the State Bar Court lacked jurisdiction, the State Bar Court's credibility findings were in error, the Decision was not supported by the weight of the evidence, and the recommended discipline was not appropriate, among other issues. Fahy further asked that the Court provide guidance concerning when an attorney should remove client funds from trust accounts and how to comply with Brown. RJN, Ex. C, pp. 8-10.

On June 20, 2007, the Supreme Court of California denied Fahy's petition for review and adopted the disciplinary recommendation of the State Bar Court. RJN, Ex. D.

On July 14, 2007, Fahy filed a petition for writ of certiorari in the United States Supreme Court. Fahy identified four issues on appeal:

> "1. In light of the holding of this Court in Brown v. Legal Foundation of Washington, 123 S.Ct. 1406, 538 U.S. 216, 155 L.Ed. 376 (U.S. 03/26/2003) may the respondents impose a presumption of clear and convincing evidence that an attorney willfully misappropriated trust funds because he held them in a non IOLTA's [footnote omitted] trust, and require the attorney to show by clear and convincing evidence that he or she did not misappropriate the funds held in trust?
>
> 2. May the respondents discipline an attorney member who, for religious reasons, refuses to 'atone' following a finding of misconduct?
>
> 3. May the respondents discipline the petitioner for his criticism of the administration of the attorney discipline system in California?
>
> 4. May the respondents summarily discipline the petitioner for uncharged legal speech?"

RJN, Ex. E, p. 2; Ex. F.

The United States Supreme Court denied Fahy's petition on October 9, 2007. RJN, Ex. G.

III. ARGUMENT

A. Under FRCP Rule 12(b)(1), Fahy's Complaint Should Be Dismissed For Lack Of Subject Matter Jurisdiction

1. The Eleventh Amendment Bar's Fahy's Suit

a. The Eleventh Amendment Bars All Claims Against the State Bar

Fahy's claims against the State Bar are absolutely barred by the Eleventh Amendment. It is well-settled that, in the absence of consent, a suit in federal court against a state or one of its agencies or departments is proscribed by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984). The State Bar of California is an 'arm of the State' for the purposes of Eleventh Amendment immunity. Hirsh v. Justices of Supreme Court of State of Cal., 67 F.3d 708, 715 (9th Cir. 1995) ("The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court."); see also Lupert v. California State Bar, 761 F.2d 1325, 1327 (9th Cir. 1985), cert. denied, 474 U.S. 916 (1985).

This jurisdictional bar applies regardless of the nature of the relief sought. Pennhurst, 465 U.S. at 100-01; see also Missouri v. Fiske, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the [Eleventh] Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State"). And it applies to pendent or supplemental state law claims as well. Pennhurst, 465 U.S. at 120-121 (pendent jurisdiction does not permit evasion of the immunity guaranteed by the Eleventh Amendment).

Accordingly, the Eleventh Amendment bars all claims against the State Bars and all claims must be dismissed against it for lack of jurisdiction. Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992) (defense of Eleventh Amendment is a jurisdictional bar); Seaborn v. State of Florida, Dept. of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998).

b. The Eleventh Amendment Bars Fahy's Claims Against the Individually Named State Bar Defendants Acting in Their Official Capacities

The Eleventh Amendment also bars the federal claims for damages against the named

State Bar officials. The grant of sovereign immunity bars a federal action for damages, or other retroactive relief, against a state official acting in his or her official capacity. Edelman v. Jordan, 415 U.S. 651, 663 (1974); Hafer v. Melo, 502 U.S. 21, 24-25 (1991) (holding that a defendant official acting in his official capacity receives the same immunity as the government agency to which he belongs); Pena v. Gardner, 976 F.2d at 472. The only relevant exception to this rule is that the Eleventh Amendment does not bar a request for prospective injunctive relief against a state official in his or her official capacity in order to end a continuing violation of federal law. Pena, 976 F.2d at 472 n.5; Edelman, 415 U.S. at 664. Thus, under the Eleventh Amendment, Fahy's claims for monetary damages and retroactive relief against all the individually named State Bar defendants in their official capacities must be dismissed. The same is true for any state claims, except that the Eleventh Amendment bars *all relief* under state law theories including prospective injunctive relief. Pennhurst, 465 U.S. at 106.

2. Plaintiff's Claims Related to His Disciplinary Proceeding Are Jurisdictionally Barred under the Rooker-Feldman Doctrine

a. Under Rooker-Feldman, Federal Courts Lack Subject-Matter Jurisdiction Over Challenges to State Court Orders

In addition to the bar of the Eleventh Amendment, Fahy's action is also subject to dismissal because the Court lacks subject matter jurisdiction on the basis of the Rooker-Feldman doctrine. Notwithstanding his purported federal claims, one thing is very clear: this lawsuit is nothing more than a poorly disguised attack on the decision of the California Supreme Court to sanction him for serious ethical misconduct.

In establishing a system of Article III courts, Congress vested the authority to review decisions of the state courts with the United States Supreme Court, not with the lower federal courts. 28 U.S.C. §§ 1257, 1291, 1331. This jurisdictional limitation on the federal court's power is known as the Rooker-Feldman doctrine, named after Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). The Rooker-Feldman doctrine bars federal courts "from exercising subject matter jurisdiction over a

suit that is a de facto appeal from a state court judgment." Kougasian v. TMSL, Inc., 359 F.3d 1136, 1139 (9th Cir. 2004) Rooker, 263 U.S. at 417**.** A federal action constitutes a de facto appeal where "claims raised in the federal court action are 'inextricably interwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules." Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). In such circumstances, "the district court is in essence being called upon to review the state court decision." Feldman, 460 U.S. at 483 n. 16; see also Reusser v. Wachovia Bank, N.A., 525 F.3d 855, 859-860 (9th Cir. 2008).

Here, Fahy is plainly challenging his treatment during his disciplinary proceedings and is seeking to relitigate the merits of this state proceeding in a prohibited federal collateral attack. His complaint sets forth a detailed version of his disciplinary case and, in broad conclusory language describes all the alleged wrongs committed against him in the course of his disciplinary proceedings. See Complaint, 21:13-25 (alleging that the State Bar Defendants "acted to intentionally falsely charge and prosecute [him]", "acted to intentionally fabricate and contrive the charges", and so on). Among other things, he asks this Court to declare; (1) that the State Bar maintains an unconstitutional presumption of culpability when prosecuting client trust account fund violations and that "petitioner [Fahy] cannot be found culpable of any wrongdoing of any kind on such a premise." (Emphasis added.) (Complaint, 4:11-13); (2) that the State Bar must conduct its disciplinary actions constitutionally (Complaint, 5:15-16); (3) that the alleged requirement that Fahy must "atone" is unconstitutional; (4) that the State Bar Court's "recommendations and decisions are and always have been invalid and void as a matter of law and incapable of review even if review was validly conducted, which it is not." (Complaint, 7:23-8:2); and, (5) that the State Bar Court is unconstitutional (Complaint, 8:13-14). Fahy goes on to state that he "has suffered distinct and palpable injuries traceable to the challenged scheme and provisions … that would likely be redressed by a favorable decision for the plaintiff petitioner …" Complaint, 9:6-10. Clearly, Fahy's complaint is firmly rooted in the California Supreme Court's decision to discipline him.

Although the Rooker-Feldman doctrine does not prohibit a district court from considering

a general constitutional challenge to a State Bar rule of general applicability (Feldman, 460 U.S. at 483), a district court has no jurisdiction over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Feldman, 460 U.S. at 485-486. Fahy is not challenging a rule or policy of general applicability. Indeed, Fahy's case is exactly the type of particularized challenge that Feldman held could not be brought in federal district court. Feldman, 460 U.S. at 482-83; see also Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005), 410 F.3d at 607; Rosenthal, 910 F.2d at 566.

It is firmly established that issues concerning attorney admission and discipline fall squarely within the Rooker-Feldman doctrine. See MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) ("orders of a state court relating to admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to state court, and not by means of an original action in a lower federal court."); Craig v. State Bar of California, 141 F.3d 1353 (9th Cir. 1998) ("Orders of a state court relating to the admission of an individual to the state bar may be reviewed only by the United States Supreme Court on writ of certiorari to the state court, and not by means of any original action in a lower federal court.").[3] Feldman itself dealt with an attorney regulatory matter.

The core principles of Rooker-Feldman were recently re-affirmed by both the Ninth Circuit in Mothershed v. Justices of Supreme Court, see infra (holding that disciplined attorney's allegation that the Oklahoma disciplinary authority failed to apply a certain ethics rule during his own state bar disciplinary hearing constituted an "as applied" challenge to a state-court decision in a particular case; therefore, under the Rooker-Feldman doctrine, the district court lacked subject matter jurisdiction to review plaintiff's disciplinary proceedings) and the United States Supreme Court in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005)

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[3] See also Doe v. State Bar of California, 415 F.Supp. 308, 311-312 (N.D. Cal. 1976) ("Because federal courts do not have jurisdiction to interfere with disciplinary proceedings of the State Bar of California, this case will be dismissed and judgment entered in favor of defendants"), aff'd 582 F.2d 25, 26 (9th Cir. 1978) ("the trial judge correctly concluded that the federal courts do not have jurisdiction to interfere with disciplinary proceedings of the State Bar of California…").

(reaffirming the doctrine of Rooker-Feldman and reiterating the continuing viability of the Rooker-Feldman doctrine in Bar-related cases, stating that Rooker-Feldman applies to "cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284 (emphasis added).

These clear legal principles bar Fahy's claims, each of which is *inextricably intertwined* with his State Bar disciplinary proceedings and the correctness of this underlying decision to suspend him. See Noel v. Hall, 341 F.3d 1148, 1157 (9th Cir. 2003). *All* of Fahy's claims arise from purported irregularities in *his* disciplinary proceeding. None of the acts about which Fahy complains caused him any damage *independent* of his suspension from practice – if he had not been sanctioned, he would have no claim at all.

Given the jurisdictional defects in Fahy's claims, the Court need not address the merits of those claims. If the merits are examined, however, that examination also provides numerous bases for dismissal.

B. Under FRCP Rule 12(b)(6), Fahy's Complaint Should Be Dismissed For Failure To State A Claim Upon Which Relief Can Be Granted

1. Legal Standard for Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint's claims. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337 (9th Cir. 1996): Bell Atlantic Corp. v. Twombly, ___ U.S. ___; 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929, 949 (2007). Statutory or common law immunity can also be the basis for dismissal. Peterson v. Jensen, 371 F.3d 1199, 1201-02 (10th Cir. 2004); Chappell v. Robbins, 73 F.3d 918, 920 (9th Cir. 1996). While the Court must assume all factual allegations to be true, it need not accept legal conclusions as true "merely because they are cast in the form of factual allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The Court is also not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences (Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004)) and that are not

plausible on their face. Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. at 1974.

Here, Fahy's complaint is replete with unsupported allegations, speculation, inconsistent statements, and legal conclusions and a notable absence of actionable factual allegations against any of the State Bar Defendants. On this basis alone, all his causes of action fail.

2. The State Bar Defendants Are Entitled to Judicial Immunity

Fahy's causes of action against State Bar Defendants are barred by judicial immunity. The federal common law doctrine of judicial immunity precludes money damages suits against state bar associations and their officers, agents and employees when such actions are based on alleged wrongdoing in the course of administering attorney disciplinary and admission functions. Hirsh, 67 F.3d at 714-15 ("State Bar Court judges and prosecutors have quasi-judicial immunity from monetary damages"); Levanti v. Tippen, 585 F.Supp. 499, 504 (S.D. Cal. 1984) (as the administrative arm of the California Supreme Court, the State Bar, and its sub-entities, are protected from liability for their official actions by the same cloak of absolute judicial immunity as worn by that tribunal. Since the State Bar functions as an arm of the California Supreme Court, it is also "...protected by the same cloak of absolute immunity worn by that tribunal"); Clark v. State of Washington, 366 F.2d 678, 681 (9th Cir. 1966) ("A prosecuting attorney, as a quasi-judicial officer, enjoys immunity from suit under the Civil Rights Act, insofar as his prosecuting functions are concerned.... As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an "integral part of the judicial process" and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state").

Judicial immunity is absolute; it cannot be overcome by allegations of bad faith or malice or by alleging that an act was unconstitutional. Mireles v. Waco, 502 U.S. 9, 11 (1991); Harvey v. Waldron, 210 F.3d 1008, 1012 (9th Cir. 2000). Moreover, judicial immunity applies not only to suits for money damages, but also to suits in equity.

3. Fahy's Claims Are Barred by Res Judicata and Collateral Estoppel

Fahy's claims are also clearly barred by res judicata and collateral estoppel as they are identical to issues already presented and litigated in his attorney disciplinary proceeding. Fahy is

estopped from relitigating the same issues that he raised or could have raised in the State Bar Court and raised again in his petition to the California Supreme Court and the U.S. Supreme Court. Moreover, there is no basis for his contention that he was not accorded a full and fair opportunity to be heard in a state proceeding that the Ninth Circuit has expressly determined conforms to the full rigors of due process. Hirsh, 67 F.3d at 713 (although the State Bar Court cannot consider federal constitutional claims, "such claims can be raised in judicial review of the Bar Court's decision."); Rosenthal, 910 F.2d at 565 ("The State of California provides attorneys subject to discipline with more than constitutionally sufficient procedural due process.").

"Whether a prior state court judgment precludes relitigation of an identical claim in federal court depends on the preclusion rules of the state." Gupta v. Thai Airways Int'l Ltd., 487 F.3d 759, 765 (9th Cir. 2007); Allen v. McCurry, 449 U.S. 90, 95 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."). In California, collateral estoppel and res judicata apply when "(1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue [or claim] necessarily decided in the prior adjudication is identical to the one that is sought to be remedied." Smith v. Exxon Mobil Oil Corporation, 153 Cal.App.4th 1407, 1414 (2007). Thus, "[t]he doctrine of res judicata [and collateral estoppel] rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent." Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn., 60 Cal.App.4th 1053, 1065 (1998). The doctrine does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue. Kremer v. Chemical Const. Corp., 456 U.S. 461, 481 (1982), citing Allen v. McCurry, 449 U.S. at 95. Like res judicata, collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his

privy and of promoting judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

a. Fahy Was a Party in the Prior Adjudication

There is no question here that Fahy, the party against whom preclusion is sought, was a party in the prior state proceeding.

b. The California Supreme Court's Decision Was a Final Judgment on the Merits

Without question, the California Supreme Court's summary denial of Fahy's petition for review constituted a final decision on the merits. See In re Rose, 22 Cal.4th at 448 ("our denial of a petition for review of a State Bar Court disciplinary decision is a final judicial determination on the merits for purposes of establishing federal jurisdiction and res judicata.").

c. The Issues in Question Are Identical to those Raised in the State Proceeding and Were Actually Litigated and Necessarily Decided in the State Proceeding

Fahy's federal action and causes of action are virtually identical to those he raised in his petition for review to the California Supreme Court (RJN, Ex. C) and in his petition for writ of certiorari to the U.S. Supreme Court. RJN, Ex. E. For example, Fahy's claim that culpability for trust account violations is based on an unconstitutional presumption was explicitly raised in his petition for review to the California Supreme Court and in his petition for writ of certiorari to the U.S. Supreme Court. Indeed, Fahy says so himself: "The petitioner complained to, and sought review from the respondents, that this premise is illegal; it is contrary to the holding of the United States Supreme Court in Brown v. Legal Foundation of Washington [citation omitted] …" Complaint, 3:17-23. The same is true of his assertion of due process violations and his other claims. To the extent he asserts different legal theories in this federal action, these claims are also barred as they clearly arise from the same state cause of action between the same parties and he had the opportunity to litigate all of these claims in the state action. Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn., 60 Cal.App.4th at 1065.

The subject issues were raised, submitted for determination and necessarily decided by

the California Supreme Court. See People v. Carter, 36 Cal.4th 1215, 1240 (2005) ("An issue is actually litigated [w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined…") (internal quotation marks omitted); Bostick v. Flex Equipment Co., Inc., 147 Cal.App.4th 80, 96 (2007) ("The necessarily decided requirement means only that the resolution of the issue cannot have been entirely unnecessary to the judgment in the initial proceedings.") (internal quotations omitted).

d. Fahy Had a Full and Fair Opportunity to Litigate the Issues in Question in the State Proceeding

Fahy's conclusory assertions that he was denied due process in the state disciplinary proceeding is plainly specious and does not obviate the barring effect of preclusion to this case. California attorney disciplinary proceedings fully comport with the due process requirements of the Fourteenth Amendment. See Hirsh, 67 F.3d at 712-713. In Rosenthal v. Justices of the Supreme Court, 910 F.2d 561, this Court held that:

> "The lawyer subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard. California provides this and other protections. It allows the lawyer to call witnesses and cross-examine them. At the hearing the burden is on the state to establish culpability 'by convincing proof and to a reasonable certainty'; 'all reasonable doubts must be resolved in favor of the accused.' The California Supreme Court, in deciding whether to accept the bar's recommendation, grants the bar's findings 'great weight' but is not bound by them. It must 'independently examine the record, reweigh the evidence and pass on the sufficiency.'… The State Bar of California provides attorneys subject to discipline with more than constitutionally sufficient due process." (Citations omitted.)

Id. at 564-565.

Here, it is abundantly clear that Fahy was accorded more than sufficient due process in his state disciplinary proceeding all the way to the U.S. Supreme Court. See Imen v. Glassford, 201 Cal.App.3d 898, 906 (1988) (decision reached in administrative proceeding can serve as basis for collateral estoppel in a later trial if the administrative agency acted in a judicial capacity and the affected party had an opportunity to litigate.). Fahy's meritless arguments of due process violations do not undermine this conclusion.

First, all of Fahy's conclusory allegations of sham proceedings, fabricated testimony and so on are unsupported by even a suggestion of necessary supporting facts and, thereby, fail to

meet the minimal federal pleading requirements. See Bell Atlantic Corp., 127 S.Ct. at 1964-65 (noting that allegations of complaint must satisfy "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,'" and must include "[f]actual allegations" sufficient to "raise a right to relief above the speculative level.")[4] Second, none of Fahy's procedural due process claims - e.g. that he was denied the right to look at some undescribed files (Complaint, 5:1 & 13:29-23), ordered to take a anger management course as a condition of probation (Complaint, 14:13-18), required to "atone" for his misconduct (Complaint, 6:24-7:9), that the State Bar Court failed to consider various motions and made incorrect findings (Complaint, 14:1-9), rise to the required level of "outrageous' violations of due process sufficient to undermine Fahy's state prosecution for ethical misconduct. See United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983) ("Prosecution is barred [for violation of due process] 'only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice.'") (quoting United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976) cert. denied, 430 U.S. 965 (1977). Finally, Fahy's allegations of bias must overcome the presumption of honesty and integrity in those serving as adjudicators. Hirsh, 67 F.3d at 713. Fahy fails to overcome this presumption.

4. Fahy Fails to State a Claim under Section 1983 Against the State Bar Defendants

Fahy alleges that the State Bar defendants violated section 42 U.S.C. section 1983. However, in order to establish a claim for relief under section 1983, a plaintiff must establish: (1) a deprivation of federal rights; (2) by a person acting under color of state law. 42 U.S.C. § 1983; American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49 (1999). Fahy has failed to meet either requirement and each such failure constitutes a separate basis for dismissal.

a. The State Bar Defendants Are Not Persons Under Section 1983

The State Bar is not a "person" subject to suit under 42 U.S.C. section 1983. Will v.

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[4] All of Fahy's class allegations are properly subject to dismissal because *pro se* plaintiffs are not permitted to bring class actions. See Fed. R. Civ. P. 23(a); see also C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987) (holding that a *pro se* litigant may not appear as an attorney for others).

Michigan Dept. State Police, 491 U.S. 58, 70-71 (1989) (neither states nor governmental entities that are considered "arms of the State" for Eleventh Amendment purposes are "persons" subject to suit under section 1983). Moreover, when a state official is sued in his or her official capacity, that individual is not considered a "person" subject to suit under section 1983. Garcia v. Superior Court, 50 Cal.3d 728, 738-39 (1990). As such, Fahy's section 1983 claim cannot stand against State Bar Defendants.

b. Fahy Fails to Establish a Federal Deprivation

As described above, Fahy asserts a hodgepodge of broadly worded due process related accusations against State Bar Defendants. Fahy was granted an opportunity to be heard "at a meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). And Fahy has failed to make any specific allegations showing that any State Bar Defendant intentionally fabricated facts, submitted false reports or testimony, or intimated or terrorized him. See Bell Atlantic Corp., 127 S.Ct. at 1964-65. Each and every one of his numerous other claims also fails to state a cause of action upon which relief can be granted.

Malicious Prosecution/Abuse of Process/Falsifying Evidence: To state a claim under section 1983 for these types of claims, Fahy must demonstrate not only a deprivation of a constitutionally protected right, but also all of the elements of the tort under state law. Haupt v. Dillar, 17 F.3d 285, 290 (9th Cir. 1994). Fahy has not met his pleading burden. Under state tort law, an individual seeking to bring such a claim must generally establish that the prior proceedings terminated in such a manner as to indicate innocence. See Jaffe v. Stone, 18 Cal.2d 146, 150 (1941); Awabdy v. City of Adelanto, 368 F.3d 1062, 1068 (9th Cir. 2004); Heck v. Humphrey, 512 U.S. 477, 484 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior … proceeding in favor of the accused."). Here, Fahy was found culpable by the California Supreme Court of four counts of attorney misconduct after which it imposed significant disciplinary sanctions.[5] Fahy fails to state a claim

[5] Fahy implies that he was prosecuted because defendants Dennings and Hummer "refused to honor their agreement and filed charges against the plaintiff". Complaint, 13:1-2. This statement,

for malicious prosecution and related claims.

Presumption of Culpability for Trust Account Violations: Fahy complains that the State Bar presumed him culpable of a trust account violation (Rule Prof. Conduct 4-100(A)) and that this presumption was offered as "conclusive and irrefutable proof" of his misappropriation. Complaint, 3:5-23. In other words, Fahy contends that the State Bar's inference of culpability in trust account matters constitutes an irrebuttable presumption and a violation of due process. This contention is nonsense.

An irrebuttable presumption may constitute a due process violation. See U.S. v. Jordan, 964 F.2d 944, 947 (9th Cir. 1992) (sentencing guideline inferring weight of marijuana plants does not create unconstitutional irrebuttable presumption); Barry v. Barchi, 443 U.S. 55, 65 (1979) (presumption that trainer was responsible once fact established that his horse was drugged is not improper.). But this case does not involve an irrebuttable presumption. In California attorney disciplinary cases "[e]vidence that the balance in a trust account fell below the amount credited to a client is sufficient *to support a finding* of willful misappropriation". Emphasis added. Edwards v. State Bar, 52 Cal.3d 28, 37 (1990). The plain language of this well-established rule of decisional law in California clearly confirms that the inference is rebuttable and only "supports" a finding of culpability. It neither creates an irrebuttable presumption of culpability nor does it eliminate the State Bar's burden to prove culpability by clear and convincing evidence. Rules Proc. of the State Bar of Cal. rule 213. Moreover, Fahy was given significant opportunity to present his side of the story. The record clearly demonstrates that Fahy took advantage of this opportunity. For example, Fahy asserts that he presented evidence that his client was not entitled to the monies held in trust and that the lien holder agreed that he could place the disputed funds in a non-IOLTA account. (Complaint, 13:10-25.) See also, RJN, Ex. B, pp. 7-8 (Review Department Opinion describing evidence Fahy presented to rebut inference that

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however, is inconsistent with Fahy's own alleged facts. Fahy himself alleges that Dennings and Hummer offered him a private reproval with an admission of moral turpitude. He objected to the moral turpitude admission and signed the stipulation without the moral turpitude portion. Complaint, 12:15-13:3. Since Fahy would not agree to admit to moral turpitude, there was no agreement.

he failed to properly maintain client funds in his trust account). The disputed inference is rebuttable, fair and not a violation of due process.

Conspiracy: Fahy asserts a conspiracy claim under both 18 U.S.C. 241 (Complaint, 20:19-21:7) and 42 U.S.C. 1985 (21:8-18). The facts that Fahy alleges to support his conspiracy claims, however, must meet Rule 12(b)(6) sufficiency. In Bell Atlantic Corp. v. Twombly, infra, the Supreme Court refined and heightened the "plain statement" pleading standard for conspiracy: the factual scenario cannot be neutral, it must be factually suggestive of a plausible conspiracy to show entitlement to relief. Id. at 1966, n. 5, 1974. Fahy, on the other hand, provides absolutely no information describing his alleged conspiracy and the part each individual State Bar Defendant played in this alleged legal drama. Because Fahy's assertions do not suggest a plausible conspiracy, his claims fall far short of Bell Atlantic's heightened "plain statement" requirement. These claims should be dismissed.

"Atonement" as Violation of Article Six of the U.S. Constitution: Fahy claims that defendants "require the petitioner [Fahy] to atone in order to maintain admission to the California State Bar, this in violation of Article Six of the United States Constitution prohibiting religious tests for holdling office of public trust." Complaint, 6:24-7:1. This contention is frivolous on its face. The State Bar established Standards for Attorney Sanctions for Professional Misconduct to serve as guidelines for determining the appropriate disciplinary sanction in individual cases. Guzzetta v. State Bar, 43 Cal.3d 962, 967 (1987) (The Standards were adopted by the State Bar Board of Governors in 1985 in an effort to achieve greater consistency in the imposition of sanctions.). The Standards are not binding on the California Supreme Court. Id. at 678. Standard 1.2(b)(v) of the Standards provides that it is a factor in aggravation if a member "demonstrated indifference towards rectification of or atonement for the consequences of his or her misconduct." Fahy can offer no authority to support his claim that this neutrally applied non-binding standard imposes a religious test on his ability to practice law.

Supervisory Liability: Fahy alleges that State Bar Defendants should be held liable for failing to supervise and train their subordinate employees (Complaint, 22:22-24:14 & 27:10-28:4) and that his constitutional deprivations were caused by State Bar Defendants' customs and

practices. Id. To establish a claim for supervisory liability, Fahy must establish that State Bar Defendants were deliberately indifferent to his constitutional deprivation or have a custom or policy that violates his federally protected rights. See Robinson v. Prunty, 249 F.3d 862, 866 (9th Cir. 2001); Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978). Fahy has alleged absolutely no material facts to support this claim. Instead, he relies on legal conclusions and conclusory statements. He offers no specific acts that could constitute "deliberate indifference" on the part of any State Bar Defendant nor has he identified any illegal custom or practice. As noted above, the rebuttable presumption of culpability in client trust account cases that offends Fahy so much is entirely proper. If there is no underlying constitutional violation, the associated claims of liability for failure to supervise and train or policy or custom must also fail. Cardenas v. Lewis, 66 Fed.Appx. 86, 90 (9th Cir. 2003).[6] [7]

5. Fahy Fails to Assert any State Causes of Action

Fahy's contentions that State Bar Defendants violated California's Unruh Act (Complaint, 24:21-23) and the Unfair Business Practices Act (Complaint, 28:5-29:4) assert state law violations to which state law applies. As discussed above, there is no Ex Parte Young

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[6] Fahy's claim that the State Bar's IOLTA statute constitutes an unlawful taking under the Fifth Amendment (Complaint, 29:11-14) was refuted by the Supreme Court in Brown v. Legal Foundation of Washington, 538 U.S. 216, 235-37 (2003) (holding that transfer of interest earned in IOLTA accounts to pay for legal services for the poor constituted a *per se* taking, but that no just compensation was due because there was no net loss to the clients who owned the principal.)

[7] Fahy offers only broad legal conclusions and unsupported conjecture to support his claim that California's attorney disciplinary system and its State Bar Court are unconstitutional and a "sham". For example, he contends that the Review Department does not review Hearing Department decisions *de novo* (Complaint, 8:7-9) and that the Supreme Court "exercises no control, oversight or supervision" over the State Bar Court. Complaint, 8: 21-25. As a matter of law, Fahy's insubstantial allegations do not support his claim and, in any case, are obviously incorrect. In fact, California decisional law is replete with examples of the Supreme Court exercising its inherent jurisdiction over the practice of law in connection with State Bar disciplinary proceedings. See e.g. In re Attorney Discipline, 19 Cal.4th 582 (1998) (Supreme Court has inherent authority to impose a regulatory fee upon attorneys for the purpose of supporting an attorney discipline system); In re Rose, 22 Cal.4th 430 (2000) (summary denial of disciplined attorney's petition for review does not deny due process since it necessarily includes a determination on the merits); & Lebbos v. State Bar, 53 Cal.3d 37 (1991) (discipline imposed upon attorney was not unconstitutional violation of associational and free speech rights.

exception to the Eleventh Amendment for state law claims, which this Court cannot hear even if limited to injunctive relief. Moreover, as demonstrated below, Fahy's assertions lack merit under California law.

a. State Bar Defendants Enjoy State Immunity from State Law Claims

As with federal claims, State Bar Defendants enjoy state immunity from suit. Fahy's disciplinary action falls squarely within the immunity granted to public entities and employees for their discretionary licensing activities. Cal. Gov. Code § 818.4; Cal. Gov. Code § 821.2; Rosenthal v. Vogt, 229 Cal.App.3d 69, 75 (1991). In addition, while assisting the California Supreme Court in attorney admission and discipline matters, the State Bar performs a judicial function and shares in the Court's judicial immunity from damages. Lebbos v. State Bar, 165 Cal.App.3d 656, 665 (1985); Greene v. Zank, 158 Cal.App.3d 497, 511 (1984); Levanti, 585 F.Supp. at 504.

b. Fahy Failed to Comply with California's Government Tort Claims Act

Fahy's state tort claims against State Bar Defendants fail because he did not comply with the Government Tort Claims Act. California law is very clear; before filing a claim against a public entity, a plaintiff must *file* a Government Tort claim with the agency. Compliance with the claims statute is mandatory. City of San Jose v. Superior Ct., 12 Cal.3d 447, 454 (1974) Dilts v. Cantua Elem. Sch. Dist., 189 Cal.App.3d 27, 32 (1987) (policy of pre-filing a tort claim with the public entity provides the entity a timely opportunity to investigate, determine facts, and settle meritorious claims without needless litigation). The absence of any allegation that Fahy has satisfied the pre-filing requirement is fatal to all his state damage claims against State Bar Defendants.

c. Fahy Fails to Adequately Allege any State Claims

Finally, Fahy's state theories simply fail to state legally cognizable claims under California law.

California Unruh Act: Fahy alleges that the State Bar violated the Unruh Act (Cal. Civ. Code §51). Complaint, 24:21-23. The Unruh Act works to ensure that all persons are free from discrimination in California business establishments. This claim fails for a few reasons: the State

Bar is immune from suit (see above), Fahy has utterly failed to allege material facts to allege a claim of discrimination, and, in any case, the Unruh Act does not apply to the State Bar. Generally, the Unruh Act applies only to private persons and organizations. See Gardner v. Vie Tanny Compton, Inc., 182 Cal.App.2d 506, 510 (1960) ("the civil rights statutes [§ 51 et seq.] are concerned with the protection of equal rights with respect to facilities and services offered to the public by *private persons*.") (emphasis added). Fahy can cite no authority applying the Unruh Act to a constitutionally established entity like the State Bar in the performance of judicial functions and which also shares in the California Supreme Court's immunity from damages.[8]

California's Unfair Competition Act: This claim (Complaint, 28:5-29:4) must also fail because, simply put, California's Unfair Competition Act (Cal. Bus. & Prof. Code § 17200 et seq.) does not apply to public entities and their employees. See Trinkle v. California State Lottery, 71 Cal.App.4th 1198, 1202-03 (1999) ("Nowhere in the Unfair Competition Act [citation omitted] is there a provision imposing governmental liability for violations of the act.").

6. Fahy's Request for Equitable Relief Is Improper and Should Be Denied

Finally, Fahy's requested injunctive and declaratory relief is improper. Fahy requests that the Court declare that the State Bar Court is unconstitutional, that the State Bar Court's recommendations and decisions "are and always have been invalid and void as a matter of law…", that the State Bar maintains an unconstitutional presumption of culpability in connection with client trust account violations and that Fahy "cannot be held culpable of any wrongdoing of any kind on such a premise", and that the State Bar must conduct its disciplinary actions constitutionally. Because the California Supreme Court has ultimate control over disciplinary proceedings, this is, in reality, a request for this Court to enjoin the California Supreme Court. Doing so would severely restrain the State Bar's ability to regulate the profession and to

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[8] Imposing Unruh Act liability for the State Bar's performance in disciplinary proceedings would interfere with the California Supreme Court's sovereign power to regulate the legal profession. See Sacramento Municipal Utility District v. County of Solano, 54 Cal.App.4th 1163, 1167 (1997) (relying on the "well-settled rule of statutory construction that absent express language to the contrary, governmental entities are excluded from the operation of general statutory provisions which implicate the exercise of sovereign powers" to deny county's taxation of a municipal power plant.)

discipline attorneys. "Any injunction regarding governmental functions is generally only permitted in extraordinary circumstances . . . as officials should be given the widest latitude while performing their official duties." Olagues v. Russoniello, 770 F.2d 791, 799 (9th Cir. 1985) (internal quotations and citations omitted). Fahy's requests for declaratory relief are similarly flagrantly self-serving, plainly improper and they should be denied.

As explained in Public Service Comm'n of Utah v. Whycoff Co., Inc., 344 U.S. 237 (1952), courts should approach declaratory proceedings against state officials with caution, as such relief is often "incompatible with a proper federal-state relationship," particularly when the requested relief would frustrate legitimate action by a state agency. Id. at 247. Fahy's requests are an obvious effort to obtain a declaratory judgment prohibiting the State Bar and California Supreme Court from imposing disciplinary sanctions upon him and, therefore, are prohibited.

IV. CONCLUSION

For each of the foregoing reasons, State Bar Defendants respectfully request that the Court grant the motion to dismiss without leave to amend. Dismissal without leave to amend is appropriate in this case as amendment would be futile. See Nunes v. Ashcroft, 348 F.3d 815, 818 (9th Cir. 2003); Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (futility justifies denial of leave to amend); see also Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1998) (amendment is futile if no set of facts can be proven under the amendment that would constitute a valid claim or defense.

DATED: September 5, 2008

Respectfully Submitted,

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Hon. Judith Epstein, Hon. Madge Watai, Hon. Ronald Stovitz, Hon. Patrice McElroy, Scott Drexel, Lawrence J. DalCerro, Donald R. Steedman, Tammy Albertsen-Murray, Erica L. Dennings, Michael Hummer, Jeffrey Bleich and Sheldon Sloan

PROOF OF SERVICE BY MAIL

I, Joan Sundt, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, CA 94105.

On, September 5, 2008, following ordinary business practice, I placed for collection or mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, California 94105, one copy of THE STATE BAR DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT fully prepaid in an envelope addressed as follows:

Francis Fahy
259 Oak Street
San Francisco, CA 94102

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for mailing with the U.S. Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. postal mail service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California this 5th day of September, 2008.

s/Joan Sundt